

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
MARIPOSA QUIK-STOP)
For Review of a Determination of)
the Division of Clean Water)
Programs, State Water Resources)
Control Board, Regarding)
Participation in the Underground)
Storage Tank Cleanup Fund.)
OCC File No. UST-32.)

ORDER NO. WQ 93-13-UST

BY THE BOARD:

Mariposa Quik-Stop, a partnership, (petitioner) seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) regarding a claim filed by the petitioner seeking reimbursement from the Underground Storage Tank Cleanup Fund (Fund).

The issue involved in this petition is whether the petitioner's claim ought to be assigned to Priority Class B, commonly referred to as the Small Business Priority Classification. The Division assigned the petitioner's claim to a lower Priority Class, Priority Class C. For the reasons hereafter stated, this Order determines that, taking into account the receipts of petitioner and its affiliates, the relevant gross receipts exceed the limits established by applicable regulation for qualification as a Small Business. The Division's Decision denying Priority Class B eligibility for petitioner's claim therefore is affirmed.

I. STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

Chapter 6.75 of the California Health and Safety Code, commencing with Section 25299.10, authorizes the State Water Resources Control Board (State Water Board) to conduct a program to reimburse certain owners and operators of petroleum underground storage tanks for corrective action costs incurred by such owners and operators.¹ Section 25299.77 of the Health and Safety Code authorizes the State Water Board to adopt regulations to implement the reimbursement program. On September 26, 1991, the State Water Board adopted regulations, hereafter referred to as Cleanup Fund Regulations or Regulations. These Regulations are contained in Chapter 18, Division 3, Title 23 of the California Code of Regulations, and became effective on December 2, 1991. Among other things, the Regulations provide for submittal of reimbursement claims to the State Water Board by owners and operators of petroleum underground storage tanks, for acceptance or rejection of these claims by the Division, and for appeal of any discretionary Division decision to the State Water Board.

Both the statutes which authorize the reimbursement program and the Cleanup Fund Regulations address the issue of prioritization of reimbursement claims.

Section 25299.52(b) of the Health and Safety Code provides in relevant part that:

¹ Unless otherwise indicated, all statutory references in this Order are to the California Health and Safety Code.

"In awarding claims pursuant to Section 25299.57 or 25299.58, the Board shall pay claims in accordance with the following priorities:

(1) Owners of tanks who are eligible to file a claim pursuant to subdivision (e) of Section 25299.54.

(2) Owners and operators of tanks who meet the requirements of subdivision (a) of Section 15399.12 of the Government Code...."

Subdivision (a) of Section 15399.12 of the Government Code refers to a "small business" as defined by subdivision (c) of Section 14837 of the Government Code. Subdivision (c) of Section 14837 of the Government Code defines a "small business". That definition in relevant part reads as follows:

"Small business" means a business, in which the principal office is located in California, and the officers of such business are domiciled in California, which is independently owned and operated, and which is not dominant in its field of operation.

"In addition to the foregoing criteria the director [of the California Department of General Services], in making a detailed definition, shall use dollar volume of business as a criterion. The maximum dollar volume which a small business may have under the definition shall vary from industry to industry to the extent necessary to reflect differing characteristics of such industries. In addition, when the character of any given industry so requires, the director may consider financial ... arrangements of any applicant seeking classification under the definition.... [T]he director may take account of other relevant factors as determined by regulation."

The general thrust of the statutes just referenced is that second priority in reimbursement of claims from the Fund, which corresponds with Priority Class B under the Cleanup Fund Regulations, is to be given to small businesses as defined in

regulations promulgated by the California Department of General Services, Office of Small and Minority Business (hereafter OSMB).

OSMB has promulgated regulations which define those entities which qualify as small businesses. (Chapter 8, Title 2, California Code of Regulations.) In relevant part, Section 1896(n)(3) of the OSMB regulations provides:

"'Small Business', when used in reference to a service firm means:

"A business concern in which the principal place of business is located in California and the owners (or officers in the case of a corporation) of such business are domiciled in California, which is independently owned and operated and which is not dominant in its field of operation; and which has been classified by Office of Small and Minority Business in one of the following industry groups, and does not have, together with any affiliates, annual receipts for the preceding three years, exceeding the maximum receipts specified below for the applicable industry groups...."

The OSMB regulations then proceed to lay out a number of industry groups and to assign a maximum three-year gross receipts limit to each industry group. Applicants to OSMB for small business certification are assigned to an industry group. An applicant who meets the gross annual receipts limit of the industry group to which it is assigned qualifies as a "small business"; an applicant who exceeds the assigned receipts limit does not so qualify.

On the subject of qualification as a "small business", the Cleanup Fund Regulations were intended to and essentially do mirror the OSMB regulations. The Cleanup Fund Regulations provide in pertinent part:

"'Small Business' means a business which complies with all of the following conditions....

(a) The principal office is located in California;

(b) The officers of the business are domiciled in California;

(c) The business is independently owned and operated;

(d) The business is not dominant in its field of operation; and

(e) Gross revenues from the business do not exceed the limits established by Section 1896 of Title 2 of the California Code of Regulations." (Cleanup Fund Regulations, Section 2804.)

State Water Board staff developed industry groups and three-year maximum receipts limits which generally coincide with the industrial groups and receipts limits established in OSMB regulations. One of the industry groups established by staff is designated "Non-Manufacturer, Petroleum Products" (hereafter Petroleum Products industry group). This industry group has a three-year maximum receipts limit of \$21,000,000.

As indicated above, under applicable statutes and OSMB regulations, qualification as a "small business" depends in part on the "receipts" of the "business concern" involved, including "affiliates" of the applicant. OSMB regulations define the relevant terms as follows:

"'Business Concern' means: (1) an entity organized for profit, including but not limited to, an individual, partnership, corporation, joint venture, association or cooperative....

"'Annual Receipts' means all pecuniary receipts (less returns, allowances and interaffiliate

transactions), the assignment of such receipts notwithstanding, of a business concern from whatever source derived, as entered or to have been entered on its regular books of account for its most recently completed fiscal year (whether on a cash, accrual, completed contracts, percentage of completion or other commonly recognized and accepted accounting method).... If a concern has acquired an affiliate during the applicable accounting period, it is necessary in computing the applicant's annual receipts, to include the affiliate's receipts during the entire applicable accounting period, rather than only its receipts during the period in which it has been an affiliate. The receipts of a former affiliate are to be included if such concern was an affiliate during a portion of the applicable accounting period. . . .

"'Affiliate' means a business concern which is a subsidiary of or owned in part by another business concern such that the applicant business concern is subject to the control of a non-applicant business concern(s).² As an alternative to actual ownership, an affiliation may be based upon the existence of other appropriate factors including common management, shared or common employees and existing contractual relationships...." (Chapter 8, Title 2, Section 1896(a), (b), and (j), California Code of Regulations.)

As indicated by the definition of "affiliate", whether another party or business concern is considered to be an "affiliate" depends on the element of "control". This term is defined by OSMB regulations as follows:

"'Control' means the authority or ability to regulate, direct, dominate or directly influence the day to day operations of any business concern. Every business concern is considered as having one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative, and it is immaterial whether it is exercised so long as the power to control exists. If the concern under consideration is a corporation, it should be noted that a party is considered to control or have the power to control a business concern if such party

² As OSMB interprets its regulations, allocable gross receipts include not just the gross receipts of those businesses which are deemed to control an applicant but also the gross receipts of those businesses that are deemed to be controlled by the applicant or any member of the applicant.

controls or has the power to control fifty percent or more of its voting stock...." (Chapter 8, Title 2, Section 1896(c), California Code of Regulations.)

In general terms, the OSMB regulations provide that in determining whether an applicant meets the gross receipts limit that applies to that applicant, OSMB will look to the gross receipts of both the applicant and any "affiliates" of the applicant; that is, to the gross receipts of any other party or parties who have control over the activities of the applicant or who are controlled by the applicant or any member thereof.

Early on, the Division decided that in determining what constituted a "small business" for purposes of assignment to Priority Class B, the Small Business Priority Classification, the Division would apply both the regulations and OSMB interpretations and applications of those regulations as closely as possible, practicable or reasonable. In substance this means that, insofar as possible, a claim against the Fund seeking the Priority Class B will be treated by the Division in the same manner that OSMB would treat an application for small business certification by the same applicant.

The site involved in this case is located in Mariposa, California (County of Mariposa). The petitioner operated a service station and food mart at this site from October of 1988 until March of 1992. On or about August 21, 1991, an apparent unauthorized release of gasoline was detected on the site. Investigations determined that the apparent source of the unauthorized release was a leak in one of the pressure supply

lines located on the site. The petitioner immediately undertook corrective action and eventually filed a claim for reimbursement from the Fund. As of the date of filing of its claim, the petitioner indicated that corrective action costs had exceeded \$1 million and the petitioner estimated that necessary additional costs to complete site clean up will range between \$400,000 and \$1 million.

The petitioner's claim was assigned to the Petroleum Products industry group, which has a three-year gross receipts limit of \$21 million, and tentatively placed in Priority Class B on the draft Priority List prepared for the Fund. Subsequently, the petitioner was advised by the Division that its claim was ineligible for Priority Class B. As indicated above, the Division eventually placed the petitioner's claim in Priority Class C.

The reason that the petitioner's claim was deemed ineligible for Priority Class B was that the Division concluded that the petitioner's gross receipts for the relevant three-year period exceeded the \$21 million limit which applied to the Petroleum Products industry group. The circumstances which resulted in the Division's conclusions are as follows.

As indicated above, the petitioner is a partnership. This partnership is owned 50 percent by Dieter H. Dubberke, Inc., a corporation, (hereafter sometimes Dubberke, Inc.), and 50 percent by William D. Thomas. The corporate partner, Dubberke, Inc., is a corporation wholly owned by Mr. and Mrs. Dieter Dubberke. The corporate partner, Mr. Dubberke, and

Mr. Thomas have and have had business interests other than Mariposa Quik-Stop. Insofar as relevant, the additional business interests include:

(1) Pioneer Market--a supermarket/grocery store involving a partnership owned 51 percent by Dubberke, Inc., and 49 percent by Mr. Thomas.

(2) Western Auto--a hardware/home/garden/automotive merchandise store involving a partnership owned one-third by Dubberke, Inc., one-third by Mr. Thomas, and one-third by a Mr. Joseph Ernst. The interests of Dubberke, Inc., and Mr. Thomas in this business were sold by these parties as of December 1, 1990.

(3) Dieter H. Dubberke, Inc.--a liquor store which, as previously indicated, involves a corporation wholly owned by Dieter H. Dubberke and his wife.

(4) Thomas & Dubberke Investments--a rental properties business involving a partnership owned 50 percent by Mr. Dubberke and 50 percent by Mr. Thomas.

The Division determined that the businesses just identified should be considered to be "affiliates" of the petitioner, and that the gross receipts of these businesses should be considered in determining whether the \$21 million gross receipts limit had been exceeded. In addition, the Division determined that the personal incomes of Mr. Dubberke and Mr. Thomas should be considered in determining whether the applicable gross receipts limit had been exceeded. The Division ultimately concluded that the total gross receipts of the

"affiliated" businesses, and of Mr. Dubberke and Mr. Thomas, for the relevant three-year period (1988-1990) included the following receipts:

(1) <u>Mariposa Quik-Stop</u>	\$ 1,497,602
(2) <u>Pioneer Market</u>	16,976,982
(3) <u>Western Auto</u>	1,968,054
(4) <u>Dieter H. Dubberke, Inc.</u>	2,096,670
(5) <u>Thomas & Dubberke Investments</u>	348,548
(6) <u>Mr. Dubberke</u>	689,064
(7) <u>Mr. Thomas</u>	111,217
Total	\$23,688,137

In making this calculation, the Division included 100 percent of the gross receipts of Western Auto even though this partnership was only two-thirds owned by Mr. Thomas and Dubberke, Inc., and even though Mr. Thomas and Dubberke, Inc., had sold their interest in this business to Mr. Ernst and an unrelated individual as of December 1, 1990.

Having determined that the relevant gross receipts attributable to the petitioner exceeded the allowable \$21 million limit, the Division determined that petitioner's claim was not entitled to placement in Priority Class B and placed the claim in Priority Class C.

II. CONTENTIONS AND FINDINGS

Contentions. The petitioner contends that its claim was entitled to placement in Priority Class B, the Small Business Priority Classification. This contention is based on several arguments. First, petitioner contends that Mariposa Quik-Stop, Pioneer Market, Western Auto, Dubberke, Inc., and Thomas &

Dubberke Investments are all separate and distinct business entities, and that Pioneer Market, Western Auto, Dubberke, Inc., and Thomas & Dubberke Investments should not be considered "affiliates" of Mariposa Quik-Stop. Second, petitioner argues that Mr. Dubberke's personal income for the relevant three-year period (\$689,064) is derived primarily from wages paid to Mr. Dubberke by the other business concerns mentioned above, and that inclusion of both the wages paid to Mr. Dubberke by these business concerns and the total gross receipts from which these wages are paid results in unfairly counting the same receipts twice. Third, petitioner argues that it is unfair to include the gross receipts of Western Auto in the calculation of gross receipts attributable to the petitioner for various reasons, including the fact that Dubberke, Inc., and Mr. Thomas sold their interest in Western Auto during 1990. Fourth, petitioner contends that the \$21 million gross receipts limit established for the Petroleum Products industry group is too low because industry practices have changed and industry receipts are much higher than they were when this limiting figure was developed. For example, the petitioner points to lottery ticket sales, increased fuel and sales taxes that must be collected, and the inflationary spiral as factors that should be considered by the State Water Board in determining what gross receipts limit should actually be established for the petitioner. Petitioner appears to suggest that the State Water Board ought to adjust the OSMB gross receipts limit for the Petroleum Products industry group to a higher figure. Finally, the petitioner argues that the State

Water Board has broad discretion under Section 2814.3(4) of the Cleanup Fund Regulations to take any action which the State Water Board deems appropriate with respect to priority classification. Petitioner suggests that for various reasons the State Water Board should exercise this discretion to place petitioner's claim into Priority Class B.

Findings. Before turning to the specific contentions of the petitioner, it would be appropriate to briefly reiterate some general principles which apply to the Fund's priority system and particularly Priority Class B.

1. The overall legislative intent behind establishment of the Fund's current priority system is that those persons who are least able to defray the costs of site cleanup ought to receive highest priority for reimbursement from the Fund.

2. With respect to Priority Class B, statutory law authorizes OSMB to adopt regulations to define "small businesses" and then expressly limits Priority Class B to those entities which qualify as a "small business" under the OSMB regulations.

3. Under applicable statutes and OSMB regulations, qualification as a "small business" depends in large part on the gross receipts of the business concern or concerns which are involved.

4. In determining appropriate gross receipts, OSMB regulations, as interpreted by OSMB, look not only to the gross receipts of the applicant for OSMB certification but also to the gross receipts of all other persons, entities and business

concerns which are considered to be "affiliates" of this applicant.

5. Whether a person or an entity is considered to be an affiliate of another person or entity depends on the element of control.

6. Statutory law basically mandates that the State Water Board utilize OSMB regulations, including those regulations which speak to calculation of gross receipts, in determining which claimants are eligible for Priority Class B. In making this determination, to the extent possible, practicable, and reasonable, the State Water Board will utilize both OSMB regulations and OSMB interpretations of those regulations.

Turning to the petitioner's arguments, the petitioner first contends that Mariposa Quik-Stop, Pioneer Market, Western Auto, Dubberke, Inc., and Thomas & Dubberke Investments are separate and distinct businesses and that none of the other business concerns should be considered "affiliates" of Mariposa Quik-Stop for the purpose of calculation of relevant gross receipts. This argument is essentially founded on two concepts. It is contended that "affiliation" depends upon control, that none of the other business concerns "controlled" Mariposa Quik-Stop nor did Mariposa Quik-Stop "control" any of the other business concerns, and that consequently there is no "affiliation" between these business concerns. Second, petitioner argues that none of the other indicia of "affiliation" are present in this case. That is, none of the business concerns

involved is a subsidiary of or owned in part by any of the other business concerns. None of the business concerns can exercise control over any of the other business concerns. There is neither commonality of management, shared or common employees, or contractual relationships among the business entities. The petitioner also contends that the other factors which might create a presumption of "affiliation" among business entities do not exist in this case.

As has been indicated, the State Water Board is basically committed to utilization of OSMB regulations, including OSMB interpretations thereof, in determining which claims are eligible for Priority Class B. A simple response to the first argument of the petitioner would be that under OSMB regulations, as those regulations are interpreted by OSMB, the other entities under discussion would be considered to be "affiliates" of Mariposa Quik-Stop for purposes of calculation of relevant gross receipts. In this case, it seems appropriate to amplify somewhat on the reasons why all of the entities under consideration in this case should be deemed to be "affiliated" for purposes of calculation of gross receipts.

The Fund priority system mandated by the Legislature is based on the premise that those persons least able to pay the costs of site cleanup ought to receive highest priority for reimbursement from the Fund. By tying Priority Class B to the OSMB regulations on "small business", the Legislature explicitly tied Priority Class B to the concept of "gross receipts". The inherent result of this approach is that the ability to pay

clean-up costs for purposes of Priority Class B is to be determined by the amount of gross receipts that are available to the claimant and all other entities that are deemed to be under the substantial control of the claimant.

In this case one of the critical issues is who should be considered to be the claimant for purposes of determining available gross receipts for clean-up activities. In deciding this issue, the State Water Board is more interested in substance than in form. The titular claimant in this case is Mariposa Quik-Stop, a partnership owned 51 percent by Dubberke, Inc., and 49 percent by Mr. Thomas. Dubberke, Inc., is a corporation wholly owned by Mr. Dubberke and his wife. Under OSMB regulations, Mr. Dubberke would clearly be deemed to be in "control" of Dubberke, Inc. For practical purposes, Mr. Dubberke undoubtedly does in fact control Dubberke, Inc. In substance, Mr. Dubberke and Mr. Thomas control Mariposa Quik-Stop. Under the circumstances of this case, to calculate gross receipts for purposes of priority classification, it is reasonable to consider Mr. Dubberke and Mr. Thomas as if they were the actual claimants for reimbursement from the Fund.

Are there gross receipts, other than the gross receipts of Mariposa Quik-Stop, which are subject to the substantial control of Mr. Dubberke and Mr. Thomas or either of them and which should be considered for purposes of priority classification? The answer to this question is clearly in the affirmative. Mr. Dubberke controls the gross receipts of

Dubberke, Inc., and his own personal receipts. Mr. Thomas controls his own personal receipts. Mr. Dubberke and Mr. Thomas together control the gross receipts of Thomas & Dubberke Investments and controlled at least a portion of the gross receipts of Western Auto prior to the sale of their interests in that business.

Accordingly, for purposes of priority classification for reimbursement from the Fund, the State Water Board finds that the gross receipts attributable to Mr. Dubberke and Mr. Thomas should be considered in determining whether the applicable gross receipts limit is exceeded, and that these gross receipts should include the personal gross receipts of Mr. Dubberke and Mr. Thomas and appropriate gross receipts for all of the business concerns controlled by these two parties.

The second contention of the petitioner is that Mr. Dubberke's income is principally derived from the other business entities which are discussed in this Order, and that counting both the gross receipts of these business entities and the wages paid to Mr. Dubberke from these receipts essentially results in "double counting" of receipts. This contention has merit.

A review of the Division's calculations and discussions with Division staff indicates the following situation. Mr. Dubberke's gross receipts for the relevant three-year period amounted to \$689,064. The petitioner has indicated that \$660,000 of this amount consisted of wages from the other business

entities discussed in this Order. The Division does not dispute this contention. In computing total gross receipts for all the affiliated entities, the Division apparently did include both the gross receipts of the other entities and the wages which were paid to Mr. Dubberke from these receipts. In effect, this process counted the \$660,000 in question twice, and the total gross receipts allocated to the petitioner should be reduced by the sum of \$660,000.

The third contention of the petitioner is that it was improper for the Division to include the gross receipts of Western Auto for the year 1990 in the gross receipts attributed to the petitioner because Dubberke, Inc., and Mr. Thomas sold their interests in this business during 1990. Discussions with the petitioner, as stated above, have indicated that the interests of Dubberke, Inc., and Mr. Thomas in this business were actually sold as of December 1, 1990. OSM regulations specifically address the issue of how to account for the receipts of an affiliate which is sold before the end of the accounting period. Section 1896(j)(4) of the OSMB regulations provides in relevant part:

"If a concern has acquired an affiliate during the applicable accounting period, it is necessary in computing the applicant's annual receipts, to include the affiliate's receipts during the entire accounting period, rather than only its receipts during the period in which it has been an affiliate. The receipts of a former affiliate are to be included if such concern was an affiliate during a portion of the applicable accounting period." (Emphasis supplied.)

Under OSMB regulations, where an affiliate is sold during a relevant accounting year, the gross receipts of that affiliate for the entire accounting year are included in the calculation of allocable gross receipts. In view of the fact that the State Water Board is essentially mandated to establish Priority Class B in accordance with OSMB regulations, the State Water Board has no choice except to utilize the OSMB regulation which specifically applies to the issue under consideration. The State Water Board therefore finds that the gross receipts attributable to the petitioner should include the appropriate gross receipts of Western Auto for the entire year of 1990 even though the interests of Dubberke, Inc., and Mr. Thomas in that business were sold as of December 1, 1990.³

There is one adjustment which needs to be made to the Division's calculations of gross receipts for Western Auto. Prior to the sale of their interests in this business, Mr. Dubberke and Mr. Thomas essentially owned and controlled only two thirds of this partnership. In the Final Division Decision Mr. Dubberke and Mr. Thomas were charged with 100 percent of the gross receipts of Western Auto despite the fact that they

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³ In this particular case it would make no difference whether the total gross receipts of Western Auto or only a pro rata share thereof were included in the calculations. If only a pro rata share were included, the gross receipts figure for Western Auto would be \$1,804,050 rather than the \$1,968,054 figure used by the Division. Use of the reduced gross receipts figure for Western Auto, even with the other adjustments indicated in this Order, would still leave the petitioner with allocable gross receipts significantly in excess of the \$21 million gross receipts limit which applies to the petitioner.

owned only two thirds of this business.⁴ Since that Decision, the Division has modified its methods of determination of gross receipts where partnerships are involved. Where a partnership is involved, the current approach of the Division calls for pro rata allocation of the gross receipts of that partnership based on the percentage of ownership of the person or persons involved. That is, if the partner under consideration owned only 50 percent of the partnership in question, only 50 percent of the gross receipts of that partnership would be allocated to that partner. The revised approach of the Division to calculation of gross receipts attributable to a partner is reasonable and should be followed here.

In the light of the foregoing discussions, the gross receipts properly attributable to the petitioner are as follows:

(1)	<u>Mariposa Quik-Stop</u>	\$ 1,497,602
(2)	<u>Pioneer Market</u>	16,976,982
(3)	<u>Western Auto (2/3rds of \$1,968,054)</u>	1,312,036
(4)	<u>Dieter H. Dubberke, Inc.</u>	22,096,670
(5)	<u>Thomas & Dubberke Investments</u>	348,548
(6)	<u>Mr. Dubberke (\$689,064-\$660,000)</u>	29,064
(7)	<u>Mr. Thomas</u>	<u>111,217</u>
	Total	\$22,372,119

The gross receipts properly attributable to the petitioner, even after the adjustments indicated, exceed the

⁴ The initial method of calculation used by the Division is consistent with the method of calculation which would have been used by OSMB in similar circumstances. In fact, OSMB would have gone much farther than the Division in this regard. OSMB staff would not only have charged Mr. Dubberke and Mr. Thomas with 100 percent of the gross receipts of Western Auto, they would have charged Mr. Dubberke and Mr. Thomas with all other gross receipts controlled by Mr. Ernst, the third partner involved in Western Auto. This result is not mandated by OSMB regulations and is not binding upon the State Water Board.

\$21 million gross receipts limit which applies to the petitioner.

The fourth contention of the petitioner essentially is that the \$21 million gross receipts limit for the Petroleum Products industry group established by OSMB is too low and ought to be adjusted upward by the State Water Board. As indicated above, the Legislature has essentially mandated that the State Water Board use OSMB regulations to determine eligibility for Priority Class B. The State Water Board does not have the power to adjust the gross receipts limits which have been established by OSMB. It is the State Water Board's understanding that OSMB will be conducting additional hearings in the reasonably near future with a view toward eventual revision of the gross receipts limits contained in OSMB regulations. Until the OSMB regulations are modified, the State Water Board has no option except to use the current gross receipts limits expressed in OSMB regulations.

The final assertion of the petitioner is that under Section 2814.3(a)(4) of the Cleanup Fund Regulations the State Water Board may take any action that the State Water Board deems appropriate with respect to priority classification. Section 2814.3(a)(4) basically indicates that in response to a petition, such as the present petition, the State Water Board may refuse to review the petition, affirm the decision under appeal, set aside or modify the decision, or "take such other action as the State Water Board deems appropriate." This language does not give the State Water Board the power to act in a manner which is inconsistent with the legislative mandates which apply to the

State Water Board and the Fund. The Legislature specifically restricted Priority Class B to claimants who would qualify as a "small business" under OSMB regulations. Even if the State Water Board wished to do so, the State Water Board is not empowered to open Priority Class B to claimants who do not qualify under the criteria established by the Legislature.

III. SUMMARY AND CONCLUSIONS

1. The current Fund priority system which was established by the Legislature is based on the premise that those persons least able to pay site clean-up costs ought to receive highest priority for reimbursement from the Fund.

2. Priority Class B is limited to those claimants who qualify as a "small business" under OSMB regulations. Under OSMB regulations, qualification as a small business depends in part on the gross receipts of the business concern or concerns under consideration.

3. In determining those gross receipts attributable to an applicant, OSMB would look not just to the gross receipts of the applicant but also to the gross receipts of the person or persons who are deemed to control the applicant or who are deemed to be controlled by the applicant.

4. Under the facts of this case, if OSMB were to determine gross receipts attributable to the petitioner, OSMB would consider the gross receipts of Mariposa Quik-Stop, Pioneer

IV. ORDER

IT IS THEREFORE ORDERED that the Decision of the Division determining that the claim of petitioner is ineligible for Priority Class B and placing this claim in Priority Class C is affirmed.

CERTIFICATION

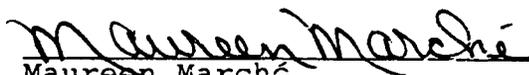
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 23, 1993.

AYE: John Caffrey
 Marc Del Piero
 James M. Stubchaer
 Mary Jane Forster
 John W. Brown

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant
to the Board

